Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1204 OF 2010
ABU SAMAH, AZHAR MA'AH AND DAVID WONG JJCA
12 MARCH 2014

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Civil Procedure — Judgments and orders — Garnishee order — Whether order wrongly granted — Whether application for garnishee order failed to show garnishees' indebtedness to judgment debtor — Whether requirements of O 49 of the Rules of the High Court 1980 not followed

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A judicial commissioner ('JC') had set aside a garnishee order the senior assistant registrar had granted to the appellant ordering the second and third respondents ('the garnishees') to pay the appellant RM2,123,056.15 with interest and costs to satisfy a summary judgment sum the appellant had obtained against the first respondent ('the judgment debtor'). In his affidavit in support of his application for the garnishee order, the appellant had relied upon a financial statement the judgment debtor had filed with the Companies Commission to show that the garnishees were indebted to the company. The financial statement showed that among the judgment debtor's assets was a sum of RM2,032,984 due from directors and RM766,054 due from 'a firm and a company' in which the directors had substantial interests. In setting aside the garnishee order, the JC held that the appellant's application failed to identify who were the directors of the judgment debtor who owed it monies. There was also failure to identify the firm or company which owed monies to the judgment debtor or identify the partners or directors/shareholders, respectively, of the alleged debtor firm or company. The JC held the information in the appellant's affidavit was insufficient to establish that the garnishees were personally indebted to the judgment debtor. The application and the garnishee order also failed to comply with the provisions of O 49 of the Rules of the High Court 1980 in failing to specify the amount the garnishees owed the judgment debtor. The instant appeal was against the JC's decision.

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Held, dismissing the appeal:

(1) The financial statement pertaining to the judgment debtor was not exhibited in its entirety. As such, the court was unable to identify who were the directors of the judgment debtor referred to in the financial statement. The court was also unable to determine how many directors were in the judgment debtor company at the material time. The appellant's supporting affidavit failed to identify the directors from whom monies were said to be due to the judgment debtor. It also did not

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state the specific sum each director owed the judgment debtor; nor did it state which directors had 'substantial financial interest' in 'a firm and a company' referred to in the note to 'Other Receivables' in the financial statement (see para 10).

(2) The JC had critically and objectively analysed the financial statement and had come to the correct conclusion. The court could not detect any flaw in his analysis (see para 11).

[Bahasa Malaysia summary

Pesuruhjaya kehakiman ('PK') telah mengetepikan perintah garnisi yang diberikan oleh timbalan pendaftar kanan kepada perayu memerintahkan responden-responden kedua dan ketiga yang digarnis untuk membayar perayu sebanyak RM2,123,056.15 dengan faedah dan kos untuk memenuhi jumlah penghakiman ringkas yang diperolehi oleh perayu terhadap responden pertama ('penghutang penghakiman'). Dalam afidavit sokongannya terhadap permohonannya untuk perintah garnisi, perayu telah bergantung ke atas pernyataan kewangan yang difailkan oleh penghutang penghakiman dengan Suruhanjaya Syarikat untuk menunjukkan bahawa garnisi telah berhutang dengan syarikat. Pernyataan kewangan menunjukkan bahawa di antara aset penghutang penghakiman adalah jumlah sebanyak RM2,032,984 yang kena dibayar oleh pengarah-pengarah dan jumlah sebanyak RM766,054 yang kena dibayar oleh 'a firm and a company' di mana pengarah-pengarah mempunyai faedah substansial. Dalam mengetepikan perintah garnisi, PK memutuskan bahawa permohonan perayu gagal untuk mengenal pasti pengarah penghutang penghakiman yang manakah yang berhutang dengannya. Terdapat kegagalan untuk mengenal pasti firma atau syarikat yang berhutang dengan penghutang penghakiman atau mengenal pasti rakan kongsi atau pengarah/pemegang saham, masing-masing, penghutang firma atau syarikat yang didakwa. PK memutuskan maklumat di dalam afidavit perayu tidak mencukupi untuk membuktikan bahawa garnisi secara persendirian berhutang dengan penghutang penghakiman. Permohonan dan perintah garnisi juga gagal untuk mematuhi dengan peruntukan A 49 Kaedah-Kaedah Mahkamah Tinggi 1990 kerana gagal untuk menentukan jumlah yang dihutang oleh garnisi terhadap penghutang penghakiman. Rayuan ini adalah terhadap keputusan PK.

Diputuskan, menolak rayuan:

(1) Pernyataan kewangan berkaitan penghutang penghakiman tidak dilampirkan jumlah keseluruhannya. Dengan itu, mahkamah tidak dapat mengenal pasti pengarah penghutang penghakiman yang manakah yang dirujuk di dalam pernyataan kewangan tersebut. Mahkamah juga tidak dapat menentukan berapa ramai pengarah di dalam syarikat penghutang penghakiman pada masa material. Afidavit sokongan perayu gagal untuk mengenal pasti pengarah mana yang berhutang dengan penghutang penghakiman. Ia juga tidak menyatakan jumlah spesifik

setiap pengarah berhutang dengan penghutang penghakiman; ataupun ia menyatakan pengarah manakah yang mempunyai 'substantial financial interest' dalam 'a firm and a company' yang dirujuk di dalam nota kepada 'Other Receivables' dalam pernyataan kewangan (lihat perenggan 10).

(2) PK secara kritis dan objektif menganalisa pernyataan kewangan tersebut dan telah mencapai kepada kesimpulan yang betul. Mahkamah tidak dapat mengesan apa-apa kecacatan dalam analisa beliau (lihat perenggan 11).]

Notes

For cases on garnishee order, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5064–5066.

Legislation referred to

Rules of the High Court 1980 O 49 rr 1(1), 2

Appeal from: Suit No K22–194 of 2005 (High Court, Kota Kinabalu)

Ting Sing Chuan (Ting Anuar & Co) for the appellant.
Ronny Cham (Ronny Cham & Co) for the second and third respondents.

Abu Samah JCA (delivering judgment of the court):

[1] This is an appeal by the appellant ('the judgment creditor') against the decision of the Kota Kinabalu High Court which set aside the garnishee order dated 18 January 2010 ordering the second and third respondents ('the garnishees') to pay to the appellant a sum of RM2,123,056.15 with interest and costs to satisfy the summary judgment sum entered by him against the first respondent ('the judgment debtor') in Kota Kinabalu High Court CS No K22–194 of 2005. The said judgment sum of RM2,123,056.15 with interest and costs remained wholly unsatisfied except for a small sum of RM2,950.

[2] On 24 November 2009 the judgment creditor filed an application pursuant to O 49 r 2 of the Rules of the High Court 1980 ('RHC') for a garnishee order against the garnishees to pay to him the amount of any debt due or accruing due to the judgment debtor from the garnishees or so much thereof as is sufficient to satisfy that judgment and the costs of the garnishee proceedings.

[3] The application was supported by a brief affidavit affirmed by the judgment creditor. The fourth and the last paragraph of the affidavit which formed the basis of the said application states:

> 4 To the best of my information and belief that the second and third defendants ('the said garnishees') are indebted to the said judgment debtor based on the financial statement filed by the first defendant with Companies Commission for the period end 31 October 2008, the second and third defendants herein are owing to the said judgment debtor. Pages 9-10, 20-21 of the said financial statement report are now produced and exhibited herewith marked P2.

The garnishees did not file any affidavit in opposition to the said application.

[4] The financial statement of the judgment debtor shows that among the current assets of the judgment debtor is 'other receivables' in the sum of RM3,194,072. Note 6 (p 20) of the financial statement shows the breakdown of 'other receivables' for the year 2008 as follows:

Sundry Receivables	…	1,014,318
Deposit & Prepayments	…	146,770
Amount due from Directors	…	2,032,984
		3,194,072

[5] Page 21 of the financial statement explains what is included in the 'sundry receivables':

> Included in sundry receivables is an amount of RM766,054 (2007: RM766,054) due from a firm and a company which the directors have substantial financial interest.

[6] On 18 February 2010 the learned senior assistant registrar allowed the judgment creditor's application for a garnishee order as follows:

> IT IS ORDERED THAT the said garnishees do forthwith pay to the said judgment creditor the sum of RM2,123,056.15 and interest and costs being so much of the debt due from the said garnishees to the said judgment debtor as is sufficient to satisfy the said judgment debt and interest and costs, together with the costs of the garnishee proceedings …

[7] The garnishees applied to the judge to set aside the garnishee order. The issue before the High Court was whether the amount due from the directors in the sum of RM2,032,984 and the 'sundry receivables' in the sum of RM766,054 constitute debt due to or accruing due to the judgment debtor from the garnishees.

[8] The learned judicial commissioner ('JC') allowed the garnishees' application and set aside the said garnishee order. The grounds of decision of the learned JC consisted of two parts. Firstly, he set out in para 4 of his decision the law, which in our view correctly, on what kind of monetary debt that can be garnished under O 49 r 1(1) of the RHC:

> [4] In an application for a garnishee order, no garnishee order can be made unless at the time when the order is made, the garnishees are indebted to the debtor: *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd & Anor* [1988] 1 MLJ 434; [1988] 2 CLJ 194. It is a condition that the debt must be due to the judgment debtor, in this case the first defendant, which debt is actionable at the time of the application for the garnishee order: *Saw Swan Kee v Sim Lim Finance (M) Bhd* [1985] 1 MLJ 221. A garnishee order does not operate to attach the debts which become payable to a judgment debtor after the date of service of the garnishee order. The garnishee order only affect debts in existence at the date of service thereof: *Heppenstal v Jackson & Barclays Bank Ltd* [1939] 1 KB 585. Further, the debt should be distinctly or clearly identifiable and not be lumped with the debts of third parties so that the debt can be attached and the terms of the garnishee order must be precise: *Bumiputera-Commerce Bank Bhd v Top-A Plastic Sdn Bhd* [2008] 5 MLJ 34; [2008] 5 CLJ 737.

[9] The second part of his judgment consisted of his detailed analysis of the financial statement, which was the basis of the judgment creditor's application. This is how the learned JC dealt with the contents in the financial statement:

> [5] In support of his application for the garnishee order, the plaintif exhibited the balance sheet of the first defendant for the year ended 31 October 2008. The balance sheet provided for 'other receivables' amounting to RM3,194,072 and 'Amount due from Subsidiary Company' amounting to RM635,204. Apparently the plaintiff averred that these 2 items in the balance sheet established that the second and third defendants were indebted to the first defendant in respect of these sums and the second and third defendants should pay part of these sums to the plaintiff under the garnishee order. Note No 6 for the item 'Other Receivables' in the Account included Sundry Receivables RM1,014,318, Deposits and Prepayments RM146,770 and Amount Due from Directors RM2,032,984. It also stated that 'included in Sundry Receivables is an amount of RM766,054 due from a firm and a company in which the directors have substantial interest'. Note No 7 in the Account stated that 'advances to Subsidiary Company are interest free and has no fixed term of payment'.
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> [6] In respect of 'Amount Due from Directors', the plaintiff in his application for the garnishee order did not specifically affirm that the second and third defendants were or are the directors of the first defendant. The plaintiff only exhibited a certificate in respect of an exempt private company signed by the second defendant to show that he was a director of the first defendant. There is no evidence in the application to establish that the third defendant was or is a director of the first defendant. Even assuming that they were or are directors of the first defendant, were or are the second and third defendants the only directors of the first defendant company or were or are

there other directors. If there were or are other directors, is the amount 'Due from Directors' due from the second and or third defendants or is the amount due from these other directors. If it is due from other director's, then the garnishee order should not be issued against the second and third defendants bearing in mind that the directors who owed this amount were not named or identified in the account. The plaintiff did not deal nor clarify these issues in the affidavit.

[7] In respect of Sundry Receivables, Note No 6 did not identify the firm or the company nor the respective amount which was due and owing from the firm or the company to the first defendant. There was no information who was the proprietor or who were the partners of this firm. There was no information who were the shareholders and directors of this company. Even assuming that both of them were directors of the first defendant, the information in Note No 6 was not sufficient to establish that the second and third defendants were or are indebted to the first defendant bearing in mind that company has a separate legal entity from the second and third defendants. Any debt which might be due and payable would be from that firm or that company and not from the second and third defendants. Therefore, the garnishee order should be made against that firm and or that company and not against the second and third defendants.

[8] …

[9] Looking at the garnishee order in this case, it is not precise enough for any debts due or accruing due to the first defendant from the second and third defendants to be attached because the sums or amount due from the second and third defendants were not set out nor ascertained in the Order. Order 49 refers to Form 98, 99 and 100 which is the garnishee order to Show Cause, Affidavit in Support of garnishee order and garnishee order respectively. All these forms or documents require the amount due and owing from the garnishee to the debtor to be stated therein. This is so that the amount to be garnished or attached can be ascertained. From the facts in this case, the plaintiff did not comply with these nor with the conditions set out in the authorities cited above. The garnishee order should not have been issued in the first place and should be set aside. I so order accordingly, with costs to the second and third defendants.

[10] We have examined the financial statement exhibited by the judgment creditor. The financial statement was not exhibited in its entirety. As such we were unable to identify who were the directors of the judgment debtor referred to in the financial statement. The supporting affidavit also failed to identify or name the directors from whom the money was said to be due to the judgment debtor. We were also unable to determine how many directors were in the judgment debtor's company at the material time. The affidavit also did not state the specific sum due to the judgment debtor from each director or which directors have 'substantial financial interest' in 'a firm and a company' referred to in the note 'other receivables', at p 21 of the financial statement.

[11] In our view, the learned JC had critically and objectively analysed the

financial statement and came to the correct conclusion. We did not detect any flaw in the analysis of the financial statement. For the abovesaid reasons we dismissed the appeal with costs.

Appeal dismissed.

Reported by Ashok Kumar